A

SYARIKAT PENGANGKUTAN KESEJAHTERAAN SDN BHD & ANOR

v.

B

TENAGA NASIONAL BHD; NG AH BOON (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-22-610-1998]
C 22 JUNE 2009

ADMINISTRATIVE LAW: *Exercise of administrative powers - Local authority - Exercise of statutory power under Electricity Supply Act 1990 - Section 11(2), 16 - Notice to landowner to enter land for installation*
D *purposes - Notices under s. 11(2) and s. 16 not addressed to registered proprietor - No hearing date and adequate description of land to be occupied in notice under s. 11(2) - Whether notices valid - No proper assessment inquiry conducted - No assessment order issued by District Land Administrator - Compensation not paid to registered owner - TNB*
E *unable to justify occupation of land by relying on s. 11(2) - TNB a trespasser*

CIVIL PROCEDURE: *Third party proceedings - Indemnity - Plaintiffs' cause of action against defendant in tort of trespass - Defendant*
F *no cause of action against third party - Claim against third party dismissed*

CONSTITUTIONAL LAW: *Right to property - Federal Constitution, art. 13 - Exercise of statutory power under Electricity Supply Act 1990 - Section 11(2), 16 - Notice to Land owner to enter Land for installation*
G *purposes - Notices under s. 11(2) and s. 16 not addressed to registered proprietor - No hearing date and adequate description of land to be occupied in notice under s. 11(2) - Notices not valid - Contravention of constitutional rights - Refusal to give legal recognition to occupation of plaintiffs' land by TNB*

H

EQUITY: *Equitable remedy and reliefs - Restitution - Discretion of court - Defendant did not come to court with clean hands - Blatant disregard of provisions of Electricity Supply Act and Federal Constitution by defendant - Defendant's claim for restitution disallowed*

I

LOCAL GOVERNMENT: *Electricity - Local authority - Issuance of notice under Electricity Supply Act 1990 - Section 11(2), 16 - Notice to landowner to enter land for installation purposes - Notices under s. 11(2) and s. 16 not addressed to registered proprietor - No hearing date and adequate description of land to be occupied in notice under s. 11(2) - Whether notices valid - No proper assessment inquiry conducted - No assessment order issued by District Land Administrator - Compensation not paid to registered owner - TNB unable to justify occupation of disputed land by relying on s. 11(2) - TNB a trespasser*

PUBLIC UTILITIES: *Electricity - Local authority - Exercise of statutory power under Electricity Supply Act 1990 - Section 11(2), 16 - Notice to landowner to enter land for installation purposes - Notices under s. 11(2) and s. 16 not addressed to registered proprietor - No hearing date and adequate description of land to be occupied in notice under s. 11(2) - Whether notices valid - No proper assessment inquiry conducted - No assessment order issued by District Land Administrator - Compensation not paid to registered owner - TNB unable to justify occupation of land by relying on s. 11(2) - TNB a trespasser*

In 1992, the first plaintiff purchased a piece of land from its then registered owner, Noble Idea. A land search carried out by the first plaintiff did not show any acquisition or occupation by the defendant pursuant to the Electricity Supply Act 1990 ('the Act'). Upon becoming the registered proprietor of the land, the first plaintiff obtained conversion of the category of land use of the land from that of 'agriculture' to that of 'building' and sold the land to the second plaintiff. A land survey subsequently conducted by the second plaintiff showed that an area of 11,302 feet ("the disputed area") was occupied by the defendant as part of its Pudu Ulu – Serdang Project. Electric lines and cables ran across the disputed area on poles built by the defendant. The first plaintiff was not aware of the defendant's occupation. The first plaintiff had never been notified by the defendant of any intended occupation, or of any inquiry; nor had the first plaintiff been awarded with any compensation for land occupation by the defendant pursuant to the Act. The defendant refused to vacate the disputed area and the plaintiffs commenced the present action against the defendant for the tort of trepass. The defendant contended that they were in lawful occupation of the disputed area by virtue of s. 11(2) of the Act. The defendant made a claim against the third party (one Ng Ah Boon) for indemnity in the event the court were to give judgment against the defendant.

Held (allowing the plaintiffs' claim against defendant with costs, and dismissing the defendant's claim against third party with costs):

(1) The defendant's occupation of the disputed area was *prima facie*, unlawful *vis-a-vis* the plaintiffs. *Prima facie*, the defendant was a trespasser. The defendant had never obtained the permission of the plaintiffs to occupy the disputed area. It was for the defendant to justify their occupation of the disputed area. The defendant was unable to justify their occupation of the disputed area by relying on s. 11(2). (para 47)

(2) The provisions of s. 11 were never followed either by the defendant or the District Land Administrator. They merely paid lip service to the provisions of ss. 11 and 16 of the Act. The notice, purportedly issued under s. 11(2) was not addressed to Noble Idea, but to another person, Wong Chiu Yiu; nor was it served on Noble Idea. The notice was in any event seriously flawed as, apart from the fact that the notice was not addressed to and served on the registered owner, the notice did not contain a date for the hearing of objections; and did not adequately describe the land to be occupied. (para 49)

(3) The s. 16 notice was also defective as it did not contain either the registered or business address of Noble Idea. Instead it contained the address of the third party, Ng Ah Boon. The notice was not served on Noble Idea for the purpose of the inquiry scheduled to be held on 30 December 1992. And as for the inquiry held on 29 January 1993, no notice was ever issued to any interested person (including Noble Idea). (para 50)

(4) The register document of title did not contain a note or an endorsement regarding the existence of the defendant's 'right of occupation' over the land. (para 51)

(5) There was no proper assessment inquiry conducted and there was no assessment order issued by the District Land Administrator as required by s. 16(1). The compensation was not paid to Noble Idea, but to the third party. The defendant wrongly regarded Ng Ah Boon as the landowner. (para 52)

(6) In the circumstances, for the court to give legal recognition to the occupation of the plaintiffs' land by the defendant would not only be contrary to the provisions of the Act, in particular ss. 11 and 16, but would also be a violation of art. 13 cl. (1) of the Federal Constitution which provides that no person shall be deprived of his property save in accordance with the law. What the defendant had done in the present case in relation to the plaintiffs' land was clearly not in accordance with the law. (para 55)

(7) Considering that the plaintiffs' cause of action against the defendant was the tort of trespass, the defendant could not have any claim at all against the third party. Ng Ah Boon could not be blamed for the defendant's wrongdoing against the plaintiffs. (para 59)

(8) The defendant was asking for restitution against Ng Ah Boon. Restitution is an equitable remedy. The court has the discretion as to whether or not to order restitution. The court was disinclined to order any restitution because based on the evidence, the defendant had not come to court with clean hands. The defendant had blatantly disregarded the provisions of the Electricity Supply Act and the Federal Constitution resulting in them committing the tort of trespass on the plaintiffs. (para 60)

Legislation referred to:
Electricity Supply Act 1990, ss. 9, 11(2), (3), (10), 16(1)
Federal Constitution, art. 13

For the plaintiffs - D Krishna (HY Lee with him); M/s HY Lee & Co
For the 2nd defendant - J Doshi; M/s Abdullah & Zainudin
For the 3rd party - SC Yong; M/s SC Yong & Assocs

Reported by Amutha Suppayah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is a writ action by the plaintiffs against the defendant for, among others, the following reliefs:

(a) a declaration that the defendant's use of the plaintiffs' land is illegal null and void *ab initio*;

A (b) a declaration that the payment of RM86,722.33 paid by the defendant to one Ng Ah Boon as compensation for the defendant's occupation of an area of 11,302 square feet of the plaintiffs' land is illegal, null and void; and

B (c) damages.

[2] There is also a claim by the defendant against the third party, Ng Ah Boon. The defendant's claim against the third party is for an order for the third party to indemnify the defendant in the event the court were to give judgment against the defendant C and award damages to the plaintiffs.

[3] At the conclusion of the trial I had allowed the plaintiff's claim with costs; with damages to be assessed by the registrar. And I had dismissed the defendant's claim against the third party D with costs.

[4] A company called Noble Idea Sdn Bhd (hereinafter shall be referred to as 'Noble Idea') was the registered owner of a parcel of land in the Mukim of Cheras, District of Ulu Langat, Selangor. E This parcel of land is known as C.T. No. 22937, Lot No. 2888, Mukim of Cheras, District of Hulu Langat. By a sale and purchase agreement dated 11 April 1992, the the first plaintiff purchased a portion of the land with an area of 1.038 acre from Noble Idea at a price of RM320,000.

F **[5]** Prior to the purchase, the first plaintiff had carried out a search on the land title at the land office and the record on the title did not show that the land had been acquired or occupied by the defendant for its purposes pursuant to the Electricity Supply Act 1990 ('the Act'). G

[6] The first plaintiff paid Noble Idea the full purchase price; and on the strength of the agreement and payment, the first plaintiff lodged a caveat in respect of the land on 23 May 1992.

H **[7]** The land was accordingly registered in the name of the first plaintiff on 6 May 1996; and the first plaintiff was in due course issued by the land office with a separate title for the portion bought. The first plaintiff's portion is now held under a new title known as Grant No. 39169, Lot 244247, Mukim of Cheras, I District of Hulu Langat.

[8] At the time of purchase, the category of land use of the land was that of 'agriculture'. The first plaintiff intended to use the land as a petrol station. So, the first plaintiff applied to the State Authority of Selangor for the category of land use of the land to be converted from that of 'agriculture' to that of 'building'. This application was approved by the State Authority on 21 August 1996.

[9] The first plaintiff then by a sale and purchase agreement dated 27 March 1997 sold the land to the second plaintiff at a price of RM4,275,000.

[10] The second plaintiff, however, subsequent to the purchase, caused the land to be surveyed, and their surveyor discovered that an area of 11,302 feet ("the disputed area") had been occupied by the defendant as part of its project known as 'Projek Aliran Elektrik 275/132 KV dari Pudu Ulu ke Serdang' ('the Pudu Ulu – Serdang Project').

[11] The defendant, Tenaga Nasional Berhad, is a corporation licensed under s. 9 of the Act. By virtue of the licence issued by the Director General of Electricity Supply, the defendant is empowered, among others, 'to place, lay, carry or maintain any posts, cables or wires for the purpose of erecting and installing supply lines and other installation or equipment on/along, through, under or across any land, inaccordance with the provisions of the Act.' But the exercise of this power is subject to the provisions of the Act.

[12] The second plaintiff discovered that there were electric lines and cables running across the disputed area on poles built by the defendant. The second plaintiff informed the first plaintiff of what they saw. The first plaintiff, however, either at the time of the purchase from Noble Idea or at the time of the sale to the second plaintiff, was not aware of the occupation by the defendant. The first plaintiff had never been notified by the defendant of any intended occupation, or of any inquiry; nor had the first plaintiff been awarded with any compensation for land occupation by the defendant pursuant to the Act.

[13] As a result of the occupation of the land by the defendant, the first plaintiff on 8 July 1997 entered into a supplementary agreement with the second plaintiff whereby the first plaintiff agreed to have the price of the sale of the land to the second plaintiff reduced by RM1,073,310; meaning that the sale price is

now reduced to RM3,310,690. Under this supplementary agreement, the second plaintiff is to hold the disputed area on trust for the first plaintiff.

[14] From the plaintiffs' standpoint, the defendant had unlawfully occupied their land. They are the lawful owners of the disputed area. The defendant had never sought their permission to occupy the disputed area. Hence the plaintiffs' solicitor issued a notice dated 31 October 1997 to the defendant demanding the latter to vacate the disputed area. The defendant refused to do so. The plaintiffs then commenced the present action against the defendant. Essentially, the plaintiffs' cause of action against the defendant is the tort of trepass.

[15] The defendant contends that they had lawfully occupied the disputed area. According to the defendant, as a licensee under the Act they are in lawful occupation of the disputed area by virtue of s. 11(2) of the Act. They claim that the occupation is in accordance with the provisions of s. 11 of the Act. It is convenient that I reproduce the whole provisions of s. 11. They are as follows:

Power to enter on land for purposes of construction

11. (1) Subject to as hereinafter provided, whenever it is necessary so to do for the purpose of installing any system of distribution of energy under this Act, a licensee may lay, place or carry on, under or over any land, other than State land, such posts and other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe and efficient, paying full compensation in accordance with section 16 to all persons interested for any disturbance, damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment.

(2) Before entering on any land for the purpose specified in subsection (1), the licensee shall give a notice stating as fully and accurately as possible the nature and extent of the acts intended to be done. The notice shall be substantially in the form set out in the First Schedule and the District Land Administrator shall specify a date upon which the State Authority shall inquire into any objection that may have been made as hereinafter provided.

(3) The aforesaid notice shall be given: A

(a) in the case of alienated land, to the owner or occupier;

(b) in the case of reserved land, to the officer or any other person in charge of the reserved land or, in B the absence of any such officer or person, to the District Land Administrator,

and may be sent by registered post or be left at the usual or last known place of abode of the person to whom it is to be given or served by the licensee or the C District Land Administrator at the expense of the licensee, either in the manner hereinbefore provided or in the manner provided for the service of notices by any written law relating to land in force in the State where the land is situated. D

(4) Any of the persons mentioned in subsection (3) may, within fourteen days of the receipt of the notice therein referred to, lodge an objection to the intended acts of the licensee. The objection may be made to the District Land Administrator, either verbally or in writing, and the E District Land Administrator shall give notice of the objection to the State Authority and to the licensee.

(5) If no objection is lodged within the time limited for that purpose by subsection (4), the licensee may forthwith enter on the land and do all or any of the acts specified F in the notice given under subsection (2).

(6) If an objection is lodged and is not withdrawn before the date fixed for the hearing thereof, the District Land Administrator shall hold an enquiry, giving all parties an opportunity to be heard. G

(7) Upon the conclusion of the enquiry the District Land Administrator may either unconditionally or subject to such terms, conditions and stipulations as he thinks fit, make an order authorizing or prohibiting any of the acts H mentioned in the notice given under subsection (2). The order shall be substantially in the form set out in the Second Schedule:

Provided that any party who is dissatisfied with the District Land Administrator's order may within twenty- I one days after the order appeal against such an order to the State Authority which may then uphold, set aside or vary the order upon such terms, conditions and stipulations as it thinks fit.

A

(8) The State Authority may, if it thinks fit, in lieu of making an order under subsection (7), direct the acquisition of any land or part of any land included in a notice given under subsection (2).

B

(9) The decision of the State Authority under this section shall be final.

(10) Notwithstanding any written law relating to land matters, the Registrar:

C

(a) upon the production to him of the notice issued by the licensee under subsection (2) together with the statement by the District Land Administrator that no objection had been lodged by any of the persons mentioned in subsection (3); or

D

(b) upon the production to him of the original order made under subsection (7) and upon the deposit with him of a certified copy of such order,

shall cause to be made on the register document of title relating to the land affected by the notice or order as the case may be, a note of the existence of the rights under such notice or order.

E

[16] How did the defendant come to be in occupation of the disputed area? Now, what happened was, unbeknown to the plaintiffs, the following events took place in respect of the land, in

F

particular, the disputed area, before the first plaintiff purchased the land from Noble Idea in April 1992. Way back in 1990 the defendant was desirous of occupying the disputed area for the purpose of their Pudu Ulu – Serdang project. The project involved the erecting of electric poles carrying electric lines and electric

G

cables over the disputed area. So, in purported compliance with s. 11(2) of the Act, the defendant issued a notice (exh. D15) to one 'Wong Chiu Yiu, c/o 86, Taman Sri Langat, Jalan Reko, 43000 Kajang'. The notice, dated 10 December 1990, states that the defendant intended to erect electrical poles carrying electrical

H

lines and cables on the disputed area. I shall reproduce below the notice in full:

I

Jadual Pertama (Seksyen 11(2))

Malaysia

Negeri: Selangor

Akta Bekalan Elektrik 1990

Notis Cadangan Memasuki Dan Membuat Kerja Atas Tanah Di Bawah Seksyen 11

Kepada:

Wong Chiu Yiu
c/o 86, Taman Sri Langat,
Jalan Reko, 43000 Kajang.

No. Lot. 2888
No. Suratmilik
Mukim Cheras

Sila ambil perhatian bahawa kami bagi pihak Tenaga Nasional Berhad yang beralamat di 129, Jalan Bangsar, Peti Surat 11003, 50732 Kuala Lumpur adalah pemegang lesen yang bertarikh 30hb. Ogos 1990 di bawah Akta Bekalan Elektrik 1990 berhasrat memasuki tanah yang tersebut di atas bagi maksud:

(a) Membersih dan memelihari kebersihan suatu rentis selebar lebih kurang ... 2 ... meter/rantai. Jika ada pokok-pokok dalam kawasan tersebut ianya akan ditebang dan begitu juga dengan bangunan-bangunan di situ yang mana difikirkan membahayakan dan perlu dipindahkan akan dipindahkan. Rentis yang dicadangkan itu telah diukur dan ditunjukkan di dalam pelan berkembar bersama ini dan dengan diwarnakan merah di mana ianya melintasi lot-lot tersebut di atas.

(b) Mendirikan tiang atau menara serta merentang dan menggendali talian bekalan elektrik di dalam kawasan rentis itu dan membuat serta memelihara sebuah lorong selebar 5 kaki bagi pemeriksaan talian tersebut, dan memastikan kawasan itu bersih daripada sebarang tumbuh-tumbuhan.

(c) Menggunakan jalan-jalan masuk/lorong-lorong yang ada bagi menyempurnakan segala kerja yang tersebut di atas.

2. Dalam masa empat belas hari dari tarikh penerimaan notis ini anda boleh menyerahkan suatu bantahan samada secara lisan atau bertulis kepada Pentadbir Tanah Daerah di Kajang.

3. Pentadbir Tanah Daerah menentukan ... sebagai hari yang bantahan itu akan didengar.

A 4. Melainkan jika anda menyerahkan suatu bantahan dalam masa yang dinyatakan, adalah menjadi anggapan bahawa anda telah mengizinkan kemasukan kami ke tanah itu mengikut terma-terma notis ini.

B 5. Anda akan dibayar pampasan yang sepatutnya bagi apa-apa kerosakan yang dilakukan.

Bertarikh pada 10 haribulan 12 1990

Zainal Abidin bin Yunus
b/p Tenaga Nasional Berhad

C

[17] At this point of time, the disputed area still belonged to Noble Idea. Noble Idea was then the registered proprietor.

[18] At this juncture of my narration of events, I shall pause to
D ask the following pertinent question: why was the notice addressed to Wong Chiu Yiu and not to the registered proprietor of the land – Noble Idea – as required by sub-s. (2) of s. 11? As to this question, the defendant does not appear to give a clear explanation. Yet service of the notice on Noble Idea is mandatory
E as sub-s. (2) says:

... the licensee shall give a notice ...

[19] The word used is 'shall'. It is my observation that the defendant's officers involved in the process of effecting the
F occupation, judging from the evidence, did not seem to have a clear idea who the landowner was; and also had manifested a cavalier attitude towards proprietary rights of landowners and the necessity of complying with the legal provisions of the Act. There is no evidence that the defendant had made a land office search
G to ascertain who the registered landowner was before issuing the notice. Indeed, the defendant's evidence seems to be inconsistent. This can be seen from the evidence of Encik Zainal Abidin (DW1), the Chief Assistant Secretary (Land Division) of the defendant who had signed and issued the notice on behalf of the
H defendant. In examination in chief, he seems to imply that the owner of the land was Wong Chiu Yiu. In his witness statement he said:

13. S: Boleh kamu memberitahu kepada siapa notis D15 ini
I ditujukan/dialamatkan?

J: Notis ini ditujukan kepada Pemilik Lot 2888 Mukim Cheras.

[20] But when cross-examined by Mr. Krishna (learned counsel for the plaintiffs) he said the owner of the land was Noble Idea. In re-examination he was – rather unfortunately – not asked by the learned counsel for the defendant to explain this inconsistency.

[21] Further, in cross-examination DW1 was asked directly by Encik Krishna as to why the notice was addressed to Wong Chiu Yiu and not to Noble Idea. DW1 was not able to give a coherent answer. This is what he said in evidence:

> Q: Mengapa notis ini diserahkan kepada Wong Chiu Yiu dan tidak kepada Noble Idea Sdn Bhd?
>
> A: Mengikut rekod yang ada, dalam bulan November 1990, Wong Chiu Yiu ada menulis kepada TNB menyatakan bahawa beliau ada mendapati orang-orang TNB berada di atas tanahnya (Lot 2888) dan menjalankan kerja-kerja ukur (survey) dan beliau telah meminta TNB mengeluarkan notis yang sepatutnya, jika TNB hendak menjalankan apa-apa kerja ke atas nama Noble Idea, yang mana beliau adalah merupakan Pengarah Noble Idea Sdn Bhd.
>
> Q: Di mana rekod itu?
>
> A: Dua atau tiga hari yang lalu saya telah membaca fail projek dan telah terjumpa dan membaca surat tersebut.
>
> Q: Di mana surat itu atau fail itu kini?
>
> A: Saya tidak pasti sama ada fail itu dibawa atau tidak ke Mahkamah pada hari ini.
>
> Q: Boleh tuan kemukakan surat itu, jika diarahkan untuk berbuat demikian.
>
> A: Ya, boleh.

[22] What is puzzling here is that, if (according to DW1's evidence) Wong Chiu Yiu had allegedly told DW1 to issue the notice in the name of Noble Idea, then why did DW1 still issue the notice in the name of Wong Chiu Yiu?

[23] But to complicate matters there is the evidence of a letter being written by an officer of the defendant, namely, one Encik Rashid bin Mohamad, the Senior Manager of the Land and Legal Unit of the defendant, to one Yap Choong Lum, a director of the second plaintiff. This letter is exh. P18 and is dated 25 April 1997.

In this letter, the writer of the letter referred to Wong Chiu Yiu as the 'owner' of the land in question. Paragraph 2 of the letter reads:

> Bayaran pampasan gantirugi telah dibayar sebanyak RM86,722.33 kepada Encik Ng Ah Boon bapa saudara kepada pemilik tanah Encik Wong Chiu Yiu.

[24] It is, however, not disputed that Wong Chiu Yiu was the director of Noble Idea at the material time. But sub-s. (3) of s. 11 of the Act requires the notice to be issued to either the owner or occupier of the land. Wong Chiu Yiu was neither.

[25] But there are other serious defects pertaining to the notice. Not only was the notice addressed to the wrong person: the notice was also served on the wrong person. The notice was not served on Noble Idea, as it ought to have been. Nor was it served on Wong Chiu Yiu – not that it was, legally, the correct thing to do, but at least that would be consistent with the addressee in the notice, namely, Wong Chiu Yiu. Instead, it was served on one Ng Ah Boon (the third party in the present case) on 10 December 1990. This is contrary to the requirement of sub-s. (3) of s. 11 which states that the notice should be served on the landowner (or occupier), that is, Noble Idea. Again here there is a pertinent question that ought to be asked: why was the notice served on Ng Ah Boon? After all, Ng Ah Boon had nothing to do with Noble Idea. He was neither a director nor a shareholder of Noble Idea; nor was he an employee or agent of Noble Idea at the time the notice (exh. D15) was served on him. Yet the notice was served on him. From the evidence of the defendant's witness, that is to say, the evidence of the notice server, Encik Buang Ismail (DW2), the notice was served on Ng Ah Boon as a representative/agent (wakil) of Wong Chiu Yiu. This is what DW2 said when cross-examined by Encik Krishna:

> Q: Encik Ng Ah Boon adalah wakil Encik Chiu Yiu, dan bukan wakil Noble Idea Sdn Bhd?
>
> A: Setuju.

[26] Ng Ah Boon, however, admits in cross-examination that prior to 27 October 1992 he was not authorised to accept any notice on behalf of either Noble Idea or Wong Chiu Yiu. Clearly the service of the notice on Ng Ah Boon was bad in law. This is his evidence when cross-examined by the learned counsel for the plaintiffs:

Q: I put it to you that any notice received by you before 27-10-1992 was not authorised? A

A: Yes.

[27] It is further to be noted that the notice was also not in compliance with the requirements of the format of the notice as prescribed by the first schedule of the Act. The format of the notice as prescribed in the first schedule is as follows: B

Electricity Supply Act 1990

Act 447 C

First Schedule

(Section 11 (2))

Malaysia

State Of ... D

Electricity Supply Act 1990
Notice Of Intention To Enter And Do Work On Land
Under Section 11

To: E

Title or other description of land ...

Take notice that I/We ... of ... being the holder of a licence dated ... under the Electricity Supply Act 1990 am/are desirous of entering the above-mentioned land for the purpose of (here set out as fully and accurately as possible what is intended to be done). F

Within fourteen days from the date of receipt of this notice you may lodge an objection either verbally or in writing with the District Land Administrator at ... G

The District Land Administrator has appointed ... as the day upon which objections will be heard.

Unless you lodge an objection within the specified time it will be presumed that you have consented to my/our entering on the land on the terms of this notice. H

You will be paid proper compensation for any damage done.

Dated this ... day of ... 19 ...

Licensee I

...

[28] The above format requires the notice to specify the title of the land or to describe the land to be occupied; the purpose being that the landowner must be certain that it is his land that the defendant intends to occupy. Yet the notice merely states:

> No. Lot. 2888
>
> No. Suratmilik:
>
> Mukim: Cheras

[29] The above is not an adequate description of the title. A full description of the land title would be:

> Surat Hakmilik No. 22937, Lot No. 2888, Mukim of Cheras, District of Hulu Langat

[30] It is further to be observed that the above notice also did not contain a date for the hearing of objections (if any). Section 11(2) imposes a duty on the part of the District Land Administrator to specify the date. This mandatory requirement is repeated by the format of the notice in the First Schedule of the Act. In the notice at exh. D15, the dotted lines in the notice were not filled with a date but simply left blank. This omission is contrary to sub-s. (2) of s. 11 and the First Schedule of the Act.

[31] By reason of the above defects, the notice, to my mind, is bad in law.

[32] There is yet another serious shortcoming. In the present case there is no evidence that a copy of the s. 11(2) notice was produced by the defendant to the Registrar of Titles as required by sub-s. (10) of s. 11 of the Act. But in the present case, even if D15 was in fact produced to the District Land Administrator, still, in my view, there was non compliance with sub-s. (10) of s. 11 either by the defendant or the District Land Administrator. I so hold because, since the notice was in several material aspects, not in compliance with the provisions of s. 11, in law, it cannot be said to be a notice issued under this section.

[33] Further, there is also no evidence that a statement by the District Land Administrator that no objection had been lodged was also produced to the Registrar of Titles. There is also no evidence that the Registrar of Titles had caused to be made on the register document of title relating to the land affected a note of the existence of the defendant's rights under the notice. All these are required to be done by sub-s. (10) of s. 11.

[34] Be that as it may, the next thing that happened was that on 9 December 1992 the District Land Administrator of Hulu Langat purportedly issued a notice to Noble Idea, pursuant to s. 16 of the Act, to notify the holding of an inquiry to be held on 30 December 1992 at the Land Office of Bandar Baru Bangi. Section 16 provides:

Compensation

16. (1) The amount of compensation, if any, payable under section 11 or 13 shall be assessed by the District Land Administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule:

Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line of any road constructed or maintained by the State Government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.

(2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

[35] The notice reads:

Pentadbir Tanah Daerah,
Pejabat Tanah Daerah,
Ulu Langat, Bandar Baru Bangi, Selangor D.E.

Ruj. Kami: Dlm. U.LGT. 75/9-88
Ruj. Tuan:
Tarikh: 9.12.92

Noble Idea Sdn Bhd.,
No. 86, Taman Seri Langat,
Jalan Reko,
43000 Kajang.

Tuan/Puan,

Perbicaraan Pampasan Projek Aliran Elektrik 275/132kV
Dari Pudu Ulu Ke Serdang
(Daerah: Ulu Langat)

Di bawah Seksyen 16 Akta Bekalan Elektrik 1990

No. Lot : 2888
No. Hakmilik : –
Mukim : Cheras

Dengan segala hormatnya dimaklumkan bahawa satu siasatan membicarakan segala tuntutan pampasan mengikut Seksyen 16 Akta Bekalan Elektrik 1990 akan diadakan pada:

Tarikh : 30.12.92
Masa : 11.00 pagi
Tempat : Pejabat Tanah Ulu Langat,
Bandar Baru Bangi

Untuk itu tuan/puan adalah dikehendaki membawa bersama-sama dokumen-dokumen seperti berikut:

1. Surat Hakmilik/Gerak.
2. Kad Pengenalan.
3. Surat-surat yang berkaitan dengannya, jika ada.

Sekiranya tuan/puan tidak hadir pada tarikh yang ditentukan itu, maka adalah dianggap tuan/puan telah bersetuju dengan keputusan yang diputuskan pada perbicaraan tersebut.

Sekian, Terima kasih.

Bertarikh pada: 10-12-92

"Berkhidmat Untuk Negara"

Saya yang menurut perintah,

t.t.
Pentadbir Tanah Daerah
(Ulu Langat)

[36] The address of Noble Idea in the above notice is stated to be No. 86 Taman Seri Langat, Jalan Reko, Kajang. But this is not the address of Noble Idea. It is the address of Ng Ah Boon. This is a serious defect. The defendant did not make any search with the Registrar of Companies in respect of Noble Idea.

[37] This inquiry notice, like the earlier notice, was also served on Ng Ah Boon and not on Noble Idea. It was served on him on 12 December 1992. This service is bad in law.

[38] The inquiry was scheduled to be held on 30 December 1992 at the Land Office, Bandar Baru Bangi. On that day, a representative of the defendant, one Puan Haslina binti Hussain (DW3), who was a senior executive of the defendant, was present for the inquiry. But Ng Ah Boon was not. For some unexplained reason, the inquiry was not held on 30 December 1990.

[39] Another inquiry was held at the land office on 29 January 1993. Again no notice was issued to Noble Idea to notify the company about this inquiry. This time it would appear that no notice at all was ever issued by the District Land Administrator. Notwithstanding this omission, DW3 was present at this inquiry and, this time, so was Ng Ah Boon. Ng Ah Boon attended purportedly as a representative of Noble Idea. But there is no evidence that he was issued by Noble Idea with either a power of attorney or a board of directors' resolution authorising him to attend the inquiry on behalf of the company. The defendant attempted to rely on a letter dated 27 October 1992 allegedly written by Wong Chiu Yiu as a director of Noble Idea addressed to the District Land Administrator informing that Ng Ah Boon was authorised to represent the company at the inquiry and to receive compensation on behalf of the company. But the admissibility of this letter was objected to by the plaintiffs' counsel, Encik Krishna, as the writer of the letter, Wong Chiu Yiu, was not called to tender the letter and hence the contents of the letter was hearsay. The learned counsel for the defendant, Ms Doshi, conceded that without calling Wong the letter was inadmissible. At the trial, Wong Chiu Yiu was never called by the defendant as a witness. Hence, the letter was only marked as exh. ID-D16.

[40] I must add here another fact: Ng Ah Boon did not bring the title of the land to the inquiry, although the notice asked him to bring along the same. Yet the District Land Administrator proceeded with the inquiry on 29 January 1993.

[41] Notwithstanding the above, at the conclusion of the inquiry, the District Land Administrator made an award of compensation of RM86,722.53 to Ng Ah Boon (see exh. D24). But the important thing to note is that sub-s. (1) of s. 16 requires the District Land Administrator to issue an assessment order in the manner as prescribed by the Third Schedule to the Act. The Third Schedule reads:

A

Electricity Supply Act 1990

Act 447

Third Schedule

(Section 16 (1))

B

Malaysia

State Of ...

Electricity Supply Act 1990

Assessment

C

To:

In the matter of an enquiry for the payment of compensation under section 10*, 11* or 13* of the Electricity Supply Act 1990 between the licensee and the owner of the land situated on Lot No ..., Title No ... , Mukim ...

D

An enquiry has been held on ... before ... the District Land Administrator ... in the presence of ... on behalf of the licensee and ... on behalf of the land owner.

E

After holding the enquiry it is hereby ordered that the compensation payable by the licensee to the land owner is as follows:

Dated this ... day of ... 19 ...

...

F

District Land Administrator

* delete whichever is not applicable.

G

[42] However, in the present case, there is no evidence of such an assessment order as prescribed being issued by the District Land Administrator. The District Land Administrator was never called as a witness by the defence. Exhibit D24 is not an assessment order as prescribed. Exh. D24 is a document that has a title or heading that reads:

H

Perbicaraan Di Bawah Seksyen 16(1) Akta Bekalan Elektrik 1990 Berhubung Dengan Cadangan Talian Penghantaran 132 kV

DARI: *Pencawang Serdang* KE: *Pencawang Pudu Ulu*

DAERAH: *Ulu Langat* TARIKH: *29/1/93*

I

[The words in italics were handwritten by DW3.]

[43] Exhibit D24 is merely a record of the inquiry held for the assessment of compensation. Nevertheless there is a disturbing observation here: although under s. 16 of the Act the inquiry was to be conducted by the District Land Administrator (and the holding of the inquiry is mandatory), yet all the particulars in exh. D24 were written, not by the District Land Administrator, but by DW3 (as admitted by DW3 when cross-examined by Encik Krishna). It was then jointly signed by the District Land Administrator and DW3 (there is no legal requirement for DW3 to sign the notes of the inquiry). The result is that the only handwriting of the Land Administrator on exh. D24 was his signature at the bottom left-hand corner of exh. D24, near his seal. That is all! Hence, exh. D24 gives me the impression that the inquiry was, practically, jointly conducted by the District Land Administrator and the defendant, when under the law the District Land Administrator alone should have conducted the inquiry; and, not only that: compared to the District Land Administrator, it would appear that it was the defendant's representative (DW3) who played a more active role in conducting the inquiry. This is highly improper and highly irregular as DW3 is an interested party at this inquiry. The inquiry is meant to be a quasi judicial proceeding, where the defendant and the landowner's purported representative (Ng Ah Boon) were supposed to be accorded equal treatment. In my judgment, the inquiry before the District Land Administrator is nothing but a sham.

[44] There is yet another disquieting observation: on the record of the inquiry, it is significant to observe that there is a glaring omission: the name and address of the landowner, Noble Idea, is not stated therein. There is only the name and address of Ng Ah Boon.

[45] Be that as it may, the payment of compensation was subsequently made by the defendant. But the payment was made by the defendant not to Noble Idea, the land owner to whom the compensation should have been paid. Instead, it was made to the third party, Ng Ah Boon, who was wrongly described in the memo as the 'land owner' (Pemilik: Ng Ah Boon – see exh. D25). A cheque of RM86,722.53 was given to and issued in the name of Ng Ah Boon on 23 March 1993. Ng Ah Boon banked in the cheque and cashed it out and paid the money to Wong Chiu Yiu. For his service, Wong Chiu Yiu paid Ng Ah Boon a sum of RM3,000.

[46] Thus there are many irregularities and confusion in the whole process.

[47] In my judgment, as the defendant is not the registered owner of the land, the defendant's occupation of the plaintiffs' land (ie, the disputed area) is, *prima facie*, unlawful *vis-a-vis* the plaintiffs. The first plaintiff is the registered owner of the land including the disputed area. The second plaintiff is a person who had purchased the land from the first plaintiff. The second plaintiff, therefore, has a beneficial interest in the land. *Prima facie*, the defendant is a trespasser. The defendant had never obtained the permission of the plaintiffs to occupy the disputed area. The defendant had arrogated to itself the right to occupy the disputed area supposedly by virtue of s. 11(2) of the Act. It is, thus, for the defendant to justify their occupation of the disputed area. To my mind, this, the defendant has failed to do. They are unable to justify their occupation of the disputed area by relying on s. 11(2). As the burden is on the defendant to justify the occupation, it is remarkable that, in the light of the confusion and many irregularities, the defendant did not consider it necessary to call:

(1) Wong Chiu Yiu;

(2) the District Land Administrator; and

(3) the Registrar of Titles,

to be their witnesses.

[48] The defendant claims that their occupation is pursuant to s. 11(2) of the Act; and hence the occupation is valid. Moreover, as submitted by Ms Doshi, the learned counsel for the defendant, Noble Idea never objected to the defendant's occupation and had in fact accepted the compensation.

[49] In my view it is wrong for the defendant to say that the occupation was carried out in accordance with s. 11(2). The reality is far from that. The truth of the matter is that the provisions of s. 11 were never followed either by the defendant or the District Land Administrator. They merely paid lip service to the provisions of ss. 11 and 16 of the Act. The notice, purportedly issued under s. 11(2), was not addressed to Noble Idea, but to another person, Wong Chiu Yiu; nor was it served on Noble Idea. The notice was in any event seriously flawed as,

apart from the fact that the notice was not addressed to and served on the registered owner, the notice (1) did not contain a date for the hearing of objections; and (2) did not adequately describe the land to be occupied.

[50] The s. 16 notice was also defective as it did not contain either the registered or business address of Noble Idea. Instead it contained the address of the third party, Ng Ah Boon. The notice was not served on Noble Idea for the purpose of the inquiry scheduled to be held on 30 December 1992. And as for the inquiry held on 29 January 1993, no notice was ever issued to any interested person (including Noble Idea),

[51] In the present case, the notice (that was purported to be issued under s. 11(2)) was never produced to the Registrar of Titles; nor was a statement by the District Land Administrator to the effect that no objection had been lodged produced to the Registrar. As a consequence, and this is very pertinent, the register document of title does not contain a note or an endorsement regarding the existence of the defendant's 'right of occupation' over the land.

[52] Furthermore, there was no proper assessment inquiry conducted by, and there was no assessment order issued by, the District Land Administrator as required by sub-s. (1) of s. 16. In addition, the compensation was not paid to Noble Idea, but to the third party. The defendant wrongly regarded Ng Ah Boon as the landowner (see exh. D25). In law, the defendant could not do this. The compensation could only be paid to Noble Idea. Even if the defendant thought that they were making the payment to Noble Idea through Ng Ah Boon, still this is legally wrong. As I have said earlier, Ng Ah Boon was neither a director nor an officer of Noble Idea, and was never issued by Noble Idea with either a power of attorney or with a board of directors' resolution authorising him to attend the inquiry or to accept any compensation on behalf of Noble Idea.

[53] All these acts and omissions are contrary to the provisions of s. 11 of the Act.

[54] Now, sub-s. (2) of s. 11 begins with the words:

> (2) Before entering on any land for the purpose specified in subsection (1), the licensee shall give a notice stating as fully and accurately as possible the nature and extent of the acts intended to be done.

[55] The presence of the phrase 'Before entering on any land ...' cannot be glossed over. In my judgment, the meaning of this phrase is that the serving of a s. 11(2) notice on the landowner (or occupier) is a pre-condition for the entering on the plaintiffs' (or Noble Idea's) land by the defendant. On the facts of the present case, however, this pre-condition was never satisfied: for a s. 11(2) notice was never issued at all in the first place, let alone served. In the light of the several serious defects in the notice (exh. D15), as I have pointed out above, the notice (exh. D15) cannot in law be recognised as a s. 11(2) notice. It is a just a document devoid of any legal significance; nothing more than that. It was a worthless piece of paper. The manner of service was defective as well. In the light of the whole circumstances, for this court to give legal recognition to the occupation of the plaintiffs' land by the defendant in the present case, would not only be contrary to the provisions of the Act, in particular ss. 11 and 16, but would also be a violation of art. 13 cl. (1) of the Federal Constitution which provides that no person shall be deprived of his property save in accordance with the law. What the defendant had done in the present case in relation to the plaintiffs' land was clearly not in accordance with the law. And in my judgment, it is no answer that Noble Idea had never objected to whatever was done by either the defendant or the District Land Administrator and had in fact accepted the compensation.

The Defendant's Third Party Proceeding Against Ng Ah Boon

[56] In this third party proceeding, the defendant (unlike the position taken by the plaintiff in the main action) takes the position that, for the purpose of the inquiry before the District Land Administrator and the payment of compensation, the third party was an agent of Noble Idea. The defendant did not object to Ng Ah Boon attending the inquiry and accepting the compensation money. Unlike the position taken by the plaintiff in the main action, the defendant and the third party in this third party proceeding agree as to the admissibility of a letter (exh. ID-D16) written by Wong Chiu Yiu, a director of Noble Idea, dated 27 October 1992 to the District Land Administrator informing the latter that Ng Ah Boon was authorised to represent Noble Idea at the inquiry and to accept any payment of compensation on behalf of Noble Idea (in the main action, exh. ID-D16 was

considered inadmissible as the person who signed the letter, Wong Chiu Yiu, was not called). It is to be recalled that Ng Ah Boon having received the compensation award of RM86,722.53 handed the money to Wong Chiu Yiu, the director of Noble Idea.

[57] From the pleadings and the submission of the defendant it is not clear to me on what legal basis is the defendant claiming indemnity from the third party, particularly, bearing in mind that Ng Ah Boon was merely an agent of Noble Idea (but only in the context of this third party proceeding) and did not receive a single cent from the compensation money. Moreover, there is no contract implied or otherwise between Ng Ah Boon and the defendant where Ng Ah Boon had agreed to indemnify the defendant in the event the plaintiffs succeed in their claim against the defendant. Furthermore, in the context of the tort of trespass committed by the defendant against the property of the plaintiffs, it is clear that Ng Ah Boon is not a co-tortfeasor.

[58] It is also pertinent to bear in mind that in the main action the plaintiffs are not claiming from the defendant for the compensation money to be paid to them. Apart from the declarations sought, the plaintiffs are merely claiming against the defendant for damages for trespassing onto their land.

[59] I must stress here that considering that the plaintiffs' cause of action against the defendant is the tort of trespass, I certainly do not think that the defendant could have any claim at all against the third party. I would like to look at the whole matter simply in this manner: if the defendant chose to commit the tort of trespass against the property of the plaintiffs, and for that the court orders the defendant to pay damages to the plaintiffs, it does not make sense to me to say that the third party is liable to indemnify the defendant for the damages that the defendant is liable to pay to the plaintiffs. Ng Ah Boon cannot be blamed for the defendant's wrongdoings against the plaintiffs.

[60] With regard to the compensation money paid to Ng Ah Boon, I wish to add this. The defendant is asking for the money paid to Ng Ah Boon to be refunded to the defendant by Ng Ah Boon (in the event my judgment is against the defendant – which, it is). In other words, the defendant is asking for restitution. Restitution is an equitable remedy. I have the discretion as to whether or not to order restitution. And on my part I am

A disinclined to order any restitution. The reason is that based on the evidence as established in the main action the defendant has not come to court with clean hands. The evidence shows that the defendant had blatantly disregarded the provisions of the Electricity Supply Act and the Federal Constitution resulting in them
B committing the tort of trespass on the plaintiffs.

[61] Accordingly, the defendant's claim against the third party is dismissed with costs.

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